III.

REPLY TO PETITIONERS' ARGUMENT.

Petitioners' contentions appear to be grouped under the six heads of their brief (pp. 44-57), to which respondents make the following reply:

1.

The Pinkett Receivers Had the Right to Appeal.

Throughout the entire Shaw-Walker proceedings the defendant corporation participated by its receivers, who represented the interests of the owners of the property of which they were in charge. Their participation was with the knowledge and acquiescence of the Court, of plaintiff and intervenors (petitioners herein) and their counsel, and of Risher, president of the corporation, and was not questioned by any proceeding in the cause (R. 1-133, 439-440).

The many assertions of petition and brief to the contrary, there has been no decree of dissolution of the corporation (R. 117, 131). The appeal was taken from a decree denying the jurisdiction of the equity court and enjoining its receivers from carrying out its orders. The receivers believed it was not only their right but their duty to uphold the jurisdiction of the appointing court. The proceedings being adversary, they did not need the consent of the court for that purpose. The right to make the defense inhered in their office.

> *Goodman Manufacturing Co.* v. *Pittsburg & Buffalo Co.*, 222 Fed. 144, 146.

As said by Mr. Justice Taft, in *Felton* v. *Ackerman*, 61 Fed. 225, 226:

> "Where the appeal is in the interest of the property, and therefore in the interest of all who shall thereafter be shown to have any right to the property, it is quite convenient and proper that the receiver

should be allowed to conduct the appellate proceedings."

The decree appealed from attempted to subject not only the corporation but the receivers to its restraint. They have the further right to contend against claims made against them; for this purpose they occupy the position of parties to the suit although officers of the court, and after a final decree they have the right of appeal.

Hinckley v. *Gilman etc. R. R. Co.*, 94 U. S. 467, 469;
Shields v. *Coleman*, 157 U. S. 168, 179-180;
Bosworth v. *St. Louis Terminal R. R. Association*, 174 U. S. 182, 188;
In re Hudson River Electric Power Co., 173 Fed. 934, 956.

2.

The Refusal of the Court of Appeals to assign the Chief Justice and five Associate Justices to hear the Oral Argument is not ground for Certiorari.

While ordinarily the refusal of this Court to grant certiorari on a particular point is not authority for a similar refusal when the same point is again raised, it is respectfully submitted that the Court's denial of a number of petitions in which the point was raised is ground for asking the denial of the instant petition.

Few, if any, cases have been heard by six justices of the United States Court of Appeals for the District of Columbia. If, as contended by the petitioners (Petitioners' Brief p. 51) that Court

> "has no power or authority to decide cases or to transact business by less than the full number of its members",

the result on hitherto unquestioned adjudications would be chaotic. If this Court has ever had any question as to the authority of the Court of Appeals to act by three of its

members, presumably it would have long since resolved that question.

Further, the petitioners here for the first time raise this point as a legal and constitutional question. In the Court of Appeals, their first motion (R. 475) assigned no reason in support of that part of the motion. Their motion for rehearing (R. 517-562) was not based on any constitutional or legal point, but was addressed to the discretion of the Court (R. 561-562), and the entire motion was in the alternative for either a rehearing or a stay of the mandate.

3.

None of Petitioners' Cited Decisions of this Court, Circuit Courts of Appeal or Local Courts is Applicable, in Fact or in Law, to the instant Case.

In *Relf* v. *Rundle,* 103 U. S. 222, (Petitioners' Brief, p. 52) the Missouri statute provided that the Superintendent of the State Insurance Department might institute proceedings for dissolution of an insolvent insurance company; upon dissolution its assets should vest in the Insurance Department for benefit of creditors. It was held that under the statute Relf, as such superintendent, had authority to sue outside the state.

The insolvent corporation in *Curran* v. *Arkansas,* 15 Howard 304, was a State bank, of which the State was the sole stockholder; and this Court held invalid certain State legislation applying the bank's assets to payment of State expenses, as against claims of creditors.

In *Bernheimer* v. *Converse,* 206 U. S. 516, 534, and *Converse* v. *Hamilton,* 224 U. S. 243, 256-7, Converse was appointed receiver of an insolvent manufacturing company, in proceedings under a Minnesota statute authorizing the receiver to prosecute actions in Minnesota or elsewhere. The question involved was his right to enforce statutory liability of stockholders by suits in New York and in Wisconsin, and this Court held he had that right.

International Life Ins. Co. v. *Sherman*, 262 U. S. 346, (Petitioners' brief, p. 53) dealt with reorganization of an insolvent insurance company by merger with another company, and *National Surety Company* v. *Coriell*, 289 U. S. 426, with reorganization of a manufacturing corporation. Each case held that assenting creditors could not bind dissenting creditors or bar them from their proportionate share of the assets of the insolvent corporation.

Lovell v. *St. Louis Mutual Life Ins. Co.*, 111 U. S. 264, held that under a reinsurance agreement effected in a suit by the State Superintendent of Insurance under the Missouri statute, a policyholder might have the value of his policy either in insurance in the new company or from the assets of the old company.

In *Carr* v. *Hamilton*, 129 U. S. 252, (Petitioners' brief, p. 54) an insolvent Missouri life insurance company was said to become *civiliter mortuus* upon its liquidation in proceedings instituted under the statute by the Superintendent of the Insurance Department.

In *Sterrett* v. *Second National Bank of Cincinnati*, 246 Fed. 753, affirmed 248 U. S. 73, an Alabama statute, and in *McConnell* v. *Hubbard*, 272 Fed. 961, a Tennessee statute, were held not to authorize receivers appointed thereunder to sue in another state.

None of the above-mentioned cases bears any similarity or is pertinent to the instant proceeding. None involved a question of priority between an equity receiver and a statutory receiver, or held that a statutory receiver "supersedes" an equity receiver, or that the title of a statutory receiver is "paramount" to the possession of an equity receiver.

Nor are the three local cases in point. (Petitioners' brief, pp. 54-55).

The question in *Johnston* v. *Davis*, 56 App. D. C. 15, 16, was the right of a debtor of a corporation in dissolution to set off his subsequent payment of its note bearing his endorsement.

In *Richards* v. *Geiger*, 39 App. D. C. 278, 284, an executor, by authority of the Probate Court, undertook to conduct decedent's bar-room business after its license had expired; it was held the probate court had no jurisdiction to give that authority. Neither the court's power to appoint executors, nor the validity of their appointment, was questioned or affected. (See R. 477-479).

Rapeer v. *Colpoys*, 66 App. D. C. 216, would seem to be authority in support of the decision of the Court of Appeals here complained of, since the decree of Mr. Justice Gordon, assuming to act as an appellate court and review the decision in the Pinkett case, clearly "transcends a limitation upon a court's fundamental power." See: *Ableman* v. *Booth*, 21 How. 506, 515.

4.

Title of the Receiver in the Shaw-Walker Statutory Dissolution Suit is not Paramount to Possession of the Pinkett Equity Receivers.

The District of Columbia statutes relating to dissolution of corporations (Chapter XVIII, Subchapter 14, Sections 768-797, Code of Law for the District of Columbia; Title 5, Chapter 13, Sections 391-419, Code of the District of Columbia, 1929) provide for voluntary dissolution, involuntary dissolution at suit of the United States, and involuntary dissolution at suit of creditors.

Voluntary dissolution may be had (Sections 768-785; 391-408) by petition of trustees, directors or officers, or stockholders of the corporation; if the court finds dissolution advisable, a decree shall be entered dissolving the corporation and appointing a receiver, who may be an officer or stockholder of the company, and who shall be vested with all the estate of the corporation for the benefit of creditors and stockholders. (Sections 772-774; 395-397).

Involuntary dissolution at suit of the United States (Sections 786-793; 409-415) is not here pertinent.

The instant proceeding was brought for involuntary dissolution at the suit of creditors. (Sections 794-797; 416-419). Under those sections the appointment of a receiver is permissive.

The quotation by petitioners (Petition and Brief, p. 63) of said Sections 396-397 out of order, immediately following Sections 416-419, gives the erroneous impression that their provisions relate to the receiver permitted in involuntary dissolution under Section 416. A similar confusion of sections was attempted in the hearing below (R., 32, 39-43, 47-51).

None of the cases cited under heading 4 of the petitioners' argument (Petitioners' brief, p. 56) is authority for the contention therein.

In *People* v. *New York City Railway Company*, 107 N. Y. S. 247 (1907), after the appointment of an equity receiver for the Railway Company in the federal court (see 157 Fed. 440), receivers were appointed in the state court under the state statute, with instructions not to interfere with the possession of the federal receivers, but to request the federal court to relinquish the property. The federal court did not comply with the request. In *Re Metropolitan Street Railway* (In *re Reisenberg*), 208 U. S. 90, 107, 111, the state receivers submitted petitions on the subject, but this Court upheld the federal receivership.

In *Wilmer* v. *Atlanta & Richmond Air Line*, 2 Woods 409, 30 Fed. Cas. 72, 79, No. 17775 (incorrectly cited in petitioners' brief) the federal court denied a writ of assistance in a conflict of jurisdiction between a Georgia receivership and a South Carolina receivership for a railroad extending into each state. The federal court said interference might create an unseemly collision between the two courts, contrary to the comity which should exist; that the test was, which court first acquired jurisdiction over the property.

The other cases cited were discussed *supra*.

5.

The Rights of Creditors of Defendant Corporation are Fully Protected in the Equity Receivership, which is not Superseded by the Decree in the Statutory Proceeding.

As previously mentioned, there has been as yet no decree of dissolution of the defendant corporation.

In *People* v. *Commercial Alliance Life Insurance Co.*, 154 N. Y. 95 (Petitioners' Brief, p. 56), an action brought by the Attorney General to dissolve a life insurance company, it was held that valuation of policies was determined as of the date the court took possession of the assets for distribution among creditors.

That principle is not controverted. The court in the Pinkett case set the close of business on September 9, 1931, the day preceding the filing of the bill of complaint, as the time of fixing valuations of equities of policyholders in the company's assets (R., 270, 275, 161). The rights of all creditors have been fully protected in that case. (R., 126 (Finding of Fact No. 16); 154-157; 160-169; 169-171.)

None of the cases cited in petitioners' brief (pp. 52-58) in support of the propositions that a statutory dissolution receiver "supersedes" a prior equity receiver, and that title of the statutory receiver is "paramount" to possession of the equity receivers, is authority on either point. *People* v. *New York City Railway, supra,* is the only case cited in which the question arose, and this Honorable Court (*Re Metropolitan Railway, supra*) decided it in favor of the equity receivership.

6.

The United States Court of Appeals had Jurisdiction to Reverse the Decree in the Shaw-Walker Case.

The argument under heading No. 6 (Petitioners' brief p. 56) misconstrues the cause at issue. There has been no appeal in the Pinkett case in which the United States Court

of Appeals for the District of Columbia might hold valid the decrees made therein. What was decided in the instant case was that Mr. Justice Gordon in the Shaw-Walker case erred in holding that the court was without jurisdiction in the Pinkett case, and in holding that the Shaw-Walker receivership superseded the Pinkett receivership.

The provisions of the District of Columbia statutes relating to the conduct of life insurance business (some of which are cited in the Record, pp. 482-486) have no application here; the license of the corporation to do business in the District was never revoked or suspended (R. 478). The "business" which the Receivers were directed to "carry on" (R. 149, 157) was that of a company which had already ceased to write insurance (R. 322), and the direction to "carry on", to the knowledge of the Superintendent of Insurance of the District (R. 139, 151-2, 215) empowered the receivers only to collect premiums and conserve existing insurance looking to a possible rehabilitation or ultimate liquidation.

There is no support in the record for the erroneous statement (Petitioners' Brief, p. 55) that the equity court authorized and directed the receivers "to operate an insolvent life insurance company in violation of local statutes, without a license from the local insurance department."

IV.

THE CHARGES CONCERNING WRONGFUL ORDERS OF THE COURT AND IMPROPER ACTIONS OF THE RECEIVERS HAVE NO BEARING UPON THE GRANTING OF THE WRIT OF CERTIORARI.

The bill in the Shaw-Walker case, based on the insolvency of the defendant corporation and its failure to pay a judgment, makes no charges concerning wrongful orders of court or improper actions of receivers in the Pinkett case. Such complaints are made in the intervening petition of Leah B. Wilson, who was not a judgment creditor but was entitled to relief under that bill only as a policyholder.

At the hearing respondents contended that questions concerning the conduct of the receivership could be heard in the Pinkett case only, and not in a collateral proceeding (R. 62-63). No proof of mismanagement was offered; the trial court specifically refused to consider the charges against the Pinkett receivers (R. 35-36, 89-90) and did not refer to them in opinion (R. 106-117) or in Findings of Fact (R. 118-129). Likewise the Court of Appeals held those questions should be raised, not by collateral attack, but in the Pinkett case (R. 511, 512-513).

To herein pass upon the truth of those charges, or their justification if true, this Court would be required to assume the functions of a *nisi prius* court and take evidence and make findings. The repetition of the charges at this time merely befogs the issue; and the delay occasioned by the actions of petitioners necessarily postpones the time when the District Court in the Pinkett case may scrutinize the receivership proceedings, as recommended by the Court of Appeals (R. 514), and the receivers may account for their trust.

CONCLUSION.

It is submitted that the petition for the writ of certiorari should be denied, thereby enabling the District Court to proceed expeditiously in accordance with the decision of the Court of Appeals.

Respectfully submitted,

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